United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7337

United States Court of Appeals

For the Second Circuit.

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P/S

THOMAS HUGHES,
Plaintiff-Appellant,

against

LOUIS J. FRANK, Commissioner of Police of the Nassau County Police Department, and the NASSAU COUNTY POLICE DEPARTMENT,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK.

BRIEF OF DEFENDANTS-APPELLEES.

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Statement.

This is an appeal from an Order of the District Court, Eastern District of New York, rendered by the Honorable Edward R. Neaher on June 2, 1976, which dismissed this complaint brought under the Civil Rights Act—42 U.S.C. §§ 1981, *et seq.*

The action sought to declare unconstitutional (relying upon United States Constitution, Amendment XIV) a rule of the Nassau County Police Department which, as interpreted, prohibited plaintiff-appellant, a Nassau County police officer, from joining a military reserve unit without the permission of defendant-appellee Police Commissioner.

The defendant-appellee Police Commissioner has set a one hundred man quota for military reserves, which was

filled at the time of plaintiff-appellant's request. Permission was refused, but plaintiff-appellant's name was placed on a waiting list to be given permission when one of the one hundred man quota spots was vacated.

Facts.

Plaintiff-appellant is a Nassau County police officer. Prior to such employment, he completed a four-year tour of active duty with the United States Navy and fulfilled a period of time in the inactive reserves. He desires at this time to join a naval reserve unit. Rule 15 of the Nassau County Police Department reads as follows:

> A member of the Force or Department is prohibited from affiliating with any organization or body, the constitution or regulations of which would in any way exact prior consideration, and prevent him from performing his departmental duties; and he shall immediately advise the Commissioner of Police of any change in his classification in relation to Selective Service, or status concerning his membership in any Federal or State military organization or reserve program.

The Rule has been interpreted by the defendant-appellee Police Department to require a police officer to secure permission from the Commissioner before joining a reserve unit. Pursuant to this Rule, the Commissioner allows one hundred police officers at a time to be part of reserve units. Since each reservist is entitled to thirty days per annum paid leave, the Department loses 3,000 man days per year (equal to fifteen men) at a cost of $400,000.

By a complaint dated November 24, 1975, the plaintiff-appellant challenged the regulation and its interpretation under the Fourteenth Amendment, and Section 9 of the Military Selective Service Act of 1967.

Defendants-appellees moved to dismiss the complaint by motion dated December 31, 1975. The District Court (Hon. Edward R. Neaher) granted the motion to dismiss by memorandum and order dated June 2, 1976, and plaintiff-appellant has appealed from that order to this Court.

(As we read his brief, plaintiff-appellant has abandoned any claim under the Selective Service Act of 1967.)

POINT I.

The procedure of the Police Department regulating participation in the Reserves does not deprive plaintiff-appellant of constitutional right.

Plaintiff-appellant (hereinafter "appellant") does not assert any deprivation of his rights as a citizen, but only as an employee-police officer of the County of Nassau. In fact, appellant agreed to abide by the order and regulations before being accepted to employment as a policeman by appellee.

A governmental employer may clearly exercise restrictions over employees which would be constitutionally void if exercised over a citizen. *Civil Service Comm. v. Letter Carriers,* 413 U. S. 548, 37 L. Ed. 2d 796, 93 S. Ct. 2880 (1973); *Broadrick v. Okla.,* 413 U. S. 601, 37 L. Ed. 2d 830, 93 S. Ct. 2908 (1973). Appellant was hired to work as a police officer, and in that regard the employer has placed demands and restrictions upon him, which the government could not make on a member of the citizenry at large. *Kelley v. Johnson,* U. S. , 47 L. Ed. 2d 708, 714 (1976).

The test of classifications made by states in treatment of the citizen varies from the "compelling governmental interest" test for limitation of fundamental constitutional rights (*Shapiro v. Thomson,* 394 U. S. 618, 634, 22 L. Ed. 2d 600, 615 [1969]), to the "rational basis" test for other limitations (*McGowan v. Maryland,* 366 U. S. 420, 6 L. Ed. 2d 393 [1961]).

Appellant asserts no deprivation of any fundamental right, much less one of constitutional proportion.

The limitations placed on public employees have been approved by the Supreme Court of the United States when relating to grooming (*Kelley v. Johnson, supra*), and even to the exercise of the basic constitutional right of political involvement. *Civil Service Comm. v. Letter Carriers, supra; Broadrick v. Okla., supra.*

The *Keyishian* case (*Keyishian v. Board of Regents,* 385 U. S. 589, 17 L. Ed. 2d 629, 87 S. Ct. 675 [1967]) cited by appellant involved teachers subject to discharge or other disciplinary measures for violating broadly worded restrictions concerning speech and assembly.

We submit that the broad language of *Keyishian* cannot be held analogous to the case at bar.

There, limitations on assembly and speech were held to be *overbroad* in relation to the purpose they served. *Keyishian's* broad flowing language is limited, as we read it, by later Supreme Court rulings, especially the political activities cases.

The criteria for reviewing limitations placed on employees by governmental employers is set forth in *Kelley,*

supra. Is there a rational connection between the regulation and the employer's primary function? The issue, then, is whether the employer's determination that such a rule be enacted is *so irrational* that it may be branded arbitrary.

Here, the rule affects the very ability of appellees to put sufficient manpower on the streets. Absent an "irrational" regulation, the Police Department must be allowed to do its job and make the decisions necessary to fulfill its responsibility.

Clearly, a personnel policy which considers giving days off for a limited number of reasons, in addition to limiting voluntary reserves to one hundred of its number, is not, on that basis, irrational. Appellant suggests that if any days off are given, all such time can only be rationally devoted to military reserves. This is clearly not the case.

The Commissioner allows 100 men of his 3800 man force to be part of voluntary reserve units at any one time. This effectively reduces his staff by the equivalent of 15 men and costs his budget $400,000.

Certainly, in face of a job freeze and an increasing population with increasing crime rates, his determination cannot be considered irrational.

CONCLUSION.

The Order of the Court below should be affirmed.

Respectfully submitted,

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Affidavit of Service By Mail

STATE OF NEW YORK)
) SS:
COUNTY OF NEW YORK)

LOUIS MARK, being duly sworn, deposes and says: That he is over twenty-one years of age: That on the 20th day of September 1976 he served three copies of the attached Brief Of Defendants-Appellees on Hartman & Alpert, Attorneys for Plaintiff-Appellant, by enclosing said copies in a fully post-paid wrapper addressed as follows and depositing same in the United States Post Office maintained at No. 350 Fifth Avenue, New York City, New York.

Hartman & Alpert, Esqs.
300 Old Country Road
Mineola, New York 11501

Louis Mark

Louis Mark

Sworn to before me this

20th day of September 1976

Quinton C. Van Wynen

QUINTON C. VAN WYNEN
Notary Public, State of New York
No. 24-4087465
Qualified in Kings County
Commission Expires March 30, 1977